Supreme Court
FILED
SEP 16 1970
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Petitioners,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MELVIN L. WULF
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Petitioners

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Petitioners,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari prior to judgment issue to the United States Court of Appeals for the Second Circuit to review the judgment of the statutory United States District Court for the Eastern District of New York, entered in the above-entitled case on June 22, 1970. Pursuant to the jurisdictional rule announced by this Court in *Mitchell* v. *Donovan*, —— U.S. ——, 38 U.S. L.W. 4514 (June 15, 1970), the above-entitled case was appealed by the respondents to the United States Court of Appeals for the Second Circuit on July 10, 1970. Peti-

tioners' motion to expedite said appeal was denied by Hon. J. Joseph Smith on August 17, 1970. Said appeal was docketed on August 19, 1970.

Opinions Below

The decision of the statutory United States District Court for the Eastern District of New York has not yet been reported. The majority opinion, by Hon. Leonard P. Moore, with Hon. John R. Bartels concurring, is set forth in the Appendix beginning at p. 1a. The dissenting opinion of Hon. Anthony P. Travia is set forth in the Appendix beginning at p. 15a. The order of Hon. J. Joseph Smith denying petitioner's motion to expedite the appeal herein is set forth in the Appendix at p. 21a. No judgment has been issued by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the statutory United States District Court was entered on June 22, 1970. Respondents' Notice of Appeal to the Court of Appeals was filed on July 10, 1970. The appeal was docketed in the United States Court of Appeals for the Second Circuit on August 19, 1970. Petitioners' motion to expedite the appeal was denied on August 17, 1970. Respondents' brief and appendix need not be served and filed until September 28, 1970. The Court of Appeals has, of course, entered no judgment herein. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1) and Rule 20 of the Rules of the Supreme Court of the United States.

Question Presented

May New York State constitutionally enact a criminal statute which absolutely prohibits the respectful display of an American flag, or any representation thereof, in conjunction with any symbol, slogan or emblem as a means of dramatizing political beliefs.

Constitutional and Statutory Provisions Involved

Section 136 of New York's General Business Law

§136. *Exhibition or display of the flag.*

Any person who: a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or

* * * * *

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

* * * * *

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America

* * * * * *

Shall be guilty of a misdemeanor.

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

Title 28 U.S.C. §1254(1)

§1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Statement of the Case

On January 15, 1970, the respondent, William Cahn, in his capacity as District Attorney of Nassau County, announced at a news conference held solely for that purpose that commencing on Monday, January 19, 1970, he would prosecute under Section 136(a) of New York's General Business Law any person found in Nassau County exhibiting or distributing any representation of the American flag in conjunction with any political emblem or slogan. Respondent specifically singled out the emblem widely distributed by petitioners, consisting of a circular representation of the American flag, having seven stars and eleven stripes, upon which a traditional peace symbol is superimposed, as one which would invite prosecution if displayed in Nassau County after January 19, 1970.

On January 16, 1970, Hon. Jacob Mishler ordered respondents to show cause why a statutory three judge District Court should not be convened. No equitable relief was granted in view of respondent's representation to the Court that he would refrain from commencing prosecutions during the pendency of the Federal Court proceedings.

On January 27, 1970, Hon. John R. Bartels ordered the convocation of a statutory three judge District Court. Plenary argument on the constitutionality of Section 136 (a) was held before Hon. Leonard P. Moore, Hon. John R. Bartels, and Hon. Anthony P. Travia. On June 22, 1970, Judge Moore, speaking for a majority, ruled that Section 136(a) could not be applied to petitioners' emblem because it did not constitute a "flag." Judge Moore ruled, however, that as applied to flags, Section 136(a) did not violate the

constitution. Judge Travia dissented on the ground that petitioner's emblem clearly fell within the definition of flag contained in the statute and that the State's interest in protecting the integrity of the flag would justify the imposition of penal sanctions upon petitioners.

Since the respondents pledged to respect the decision of the District Court pending appeal, no injunctive relief was issued by the District Court. Accordingly, pursuant to the newly enunciated jurisdictional rule of *Mitchell* v. *Donovan*, —— U.S. ——, 38 U.S.L.W. 4514 (June 15, 1970), the respondent Cahn filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit on July 10, 1970 and docketed his appeal on August 19, 1970. Petitioners' motion to expedite the appeal in the Court of Appeals was denied on August 17, 1970.

Although the respondent Cahn has respected his pledge to refrain from prosecuting petitioners pending the outcome of the instant case, arrests and prosecutions for displaying the emblem in question have reached epidemic proportions elsewhere in New York State.

In the City of New York alone, counsel herein represent over 40 persons who have been charged with displaying the emblem in question, usually as a decal on the rear automobile windshield. Hardly a day passes that a new arrest is not reported. Attempts to seek a moratorium by the New York City Police Department on new arrests pending the outcome of the instant case have ended in failure.

Reasons for Granting the Writ Prior to Judgment

Petitioners seek the extraordinary relief of certiorari prior to judgment in the belief that the instant case presents issues of great public importance which parallel and complement the difficult constitutional questions raised in *Radich* v. *New York*, October Term 1969, No. 1589, currently pending before this Court. See, generally, *Hannah* v. *Slawson*, 361 U.S. 910 (1959); *United States* v. *Thomas*, 361 U.S. 950 (1960); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 12 (1963); *Hannah* v. *Larche*, 363 U.S. 420, 422, n. 3 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283 (1960); *Reid* v. *Covert*, 340 U.S. 1, 5 (1957); *White* v. *Mechanics' Securities Corporation*, 269 U.S. 283, 299 (1925); *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-325 (1930); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 411-412, 415 n. 2 (1931); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952); *Taylor* v. *McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946); *Staiuback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 370-371 (1949).

In *Radich*, Sections 136(d) and 136(f) of New York's General Business Law, which prohibit "casting contempt" upon the American flag are challenged as violative of the constitution. The basic issue posed in *Radich*, is whether the state may punish contemptuous usage of the flag which is intended to communicate an idea.

In the instant case, all concede that no contemptuous usage of the flag has occurred. Instead, New York State seeks, pursuant to Section 136(a) of its General Business Law, to prohibit absolutely even respectful usage of the flag as an aid in the transmission of ideas.

Thus, the two cases, when viewed together, present the entire spectrum of flag usage in a communicative context—beginning with disrespect and contempt and running the gamut to respectful adoption. Given the complementary nature of the issues raised by *Radich* and *Long Island Viet Nam Moratorium*, it is respectfully submitted that the interests of judicial economy would be served by granting the writ herein and consolidating the instant case for argument with *Radich* v. *New York*.[1]

Substantive Reasons for Granting the Writ

Introduction

This case is another in a series of judicial explorations into the constitutional implications of state imposed flag veneration. E.g., *West Virginia* v. *Barnette*, 319 U.S. 324 (1943); *Frain* v. *Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969); *Street* v. *New York*, 394 U.S. 576 (1969); *Halter* v. *Nebraska*, 205 U.S. 34 (1907). See generally, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press 1962). In each case, the underlying dilemma has been the extent to which a free society may compel respect or veneration for its flag. Petitioners believe that in a free society no person should be compelled to make ritualistic obeisance to a trapping of the state, whether by being forced to salute it or by being forced to treat it as though it were the secular equivalent of a religious icon.

---

[1] It would appear highly artificial to require the instant case to undergo a potentially superfluous appeal to the Court of Appeals while the potentially controlling precedent (*Radich*) is decided by this Court. The artificiality is heightened by the fact that had the District Court enjoined respondent, rather than relying upon his good faith, a direct appeal to this Court would have unquestionably been available.

Our society has consistently resisted the inevitable pressures to create a secular religion based upon the worship of the state and its trappings. Our flag, as the emblem of a society of free men, must symbolize, paradoxically, the right of free men to do with it as their consciences dictate. Those who would ignore that paradox, inherent in the very nature of freedom, are the true, if inadvertent, defilers of our national symbol.

No State May Constitutionally Impose an Absolute Bar Upon the Use of the American Flag as an Aid in the Communication of Ideas

Section 136(a) of New York's General Business Law is nothing less than an attempt to effect a total insulation of the American flag from the realm of ideas. It purports to outlaw respectful as well as contemptuous usage. It purports to outlaw traditional as well as newly evolved forms of communicative activity.

Since the statute serves no purpose other than the impermissible state interest in compelling veneration for the flag, and since the statute purports to prohibit traditional modes of communicative activity, it is clearly unconstitutional.

1. *Section 136(a) Protects No Valid State Interest*

In *Street* v. *New York*, 394 U.S. 576 (1969), Mr. Justice Harlan, writing for the Court, enumerated the potential state interests which a flag veneration statute could conceivably serve. *Id.* at 590-591. Mr. Justice Harlan listed (1) a prohibition upon incitement to unlawful activity; (2) an interest in preventing breaches of the peace caused

by hostile reactions to a partisan use of the flag; (3) an interest in protecting the sensibilities of passers-by who might be offended by a particular use of flag; and (4) an interest in assuring that citizens maintain proper respect for the flag.

Clearly, the statute in question is not designed to deal with alleged incitements to unlawful acts.

Nor can the statute be sustained as an attempt to prevent public disorder caused by a hostile audience. The mere fact that a given communicative act may displease onlookers and even rouse them to anger cannot justify the suppression of such communication. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). The First Amendment could not long survive the existence of a "heckler's veto."

Mr. Justice Harlan properly gave short shrift to the third possible state interest underlying flag veneration statutes—that of protecting the sensibilities of passers-by. He stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, *supra*, at 592.

Finally, Mr. Justice Harlan, drawing heavily upon *West Virginia* v. *Barnette*, *supra*, dismissed the state interest in compelling proper respect for the flag as being unworthy of a free society. *Street* v. *New York*, *supra*, at 593.

An analysis of Section 136(a) reveals that its only possible purpose is the compulsion of respect for the flag. In fact, both Judge Moore, writing for the majority, and Judge Travia, dissenting, recognized that protection of the flag is the statute's sole purpose. As Mr. Justice Harlan has recognized, such a purpose is simply unworthy of a free society.

2. *The Protected Nature of Petitioner's Communicative Activity*

Street v. *New York*, 394 U.S. 576 (1969), held that traditional modes of First Amendment activity involving the flag were absolutely protected from governmental harassment, even if the traditional First Amendment activity cast contempt upon the flag.

Therefore, if the petitioners were engaged in a traditional mode of First Amendment activity "akin to pure speech," their communicative activity is absolutely protected.

Historically, it has been traditional to superimpose emblems, symbols and slogans upon a representation of the American flag in order to dramatize a political message. See Exhibits A-J to this petition.

In *Tinker* v. *Des Moines*, 393 U.S. 503 (1969), this Court ruled that the display of political emblems was traditional First Amendment activity entitled to plenary constitutional protection. Mr. Justice Fortas, writing for the Court, explicitly noted that the display of political emblems was "akin to pure speech" and entitled to the same degree of constitutional protection as verbal speech. *Tinker* v. *Des Moines*, *supra*, at 505-506.

In so ruling, the Court was merely reaffirming the doctrine, enunciated in *Stromberg* v. *California*, 283 U.S. 359 (1931), that the display of banners and emblems is fully protected by the First Amendment. See also, *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966).

Thus, in displaying political emblems involving the American flag, petitioners are engaged in a traditional mode of communicative activity "akin to pure speech" and the rationale of *Street* requires that New York's attempt to outlaw the communication because the flag is involved must be condemned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MELVIN L. WULF
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Petitioners

Exhibit A

[United States Information Agency Poster
(Moscow—1959)]

АМЕРИКАНСКАЯ

ВЫСТАВКА

В ПАРКЕ «СОКОЛЬНИКИ»

МОСКВА. 25-го ИЮЛЯ—1-го СЕНТЯБРЯ 1959 г.
ОТКРЫТА ЕЖЕДНЕВНО с 11.00 до 22.00 час.

Билеты продаются в театральных кассах и в кассах при входах в парк «Сокольники».
Входная плата для взрослых—1 руб., для детей и рядовых военнослужащих—50 коп.

Exhibit B

[United States Marine Corps Recruiting Poster]

Exhibit C

[World War I Recruiting Poster]

Exhibit D

[CAMPAIGN BANNER OF THE NATIVE AMERICAN PARTY—1844]

Exhibit E

[CAMPAIGN BANNER OF HENRY CLAY—1844]

Exhibit F

[CAMPAIGN BANNER OF HENRY CLAY—*circa* 1844]

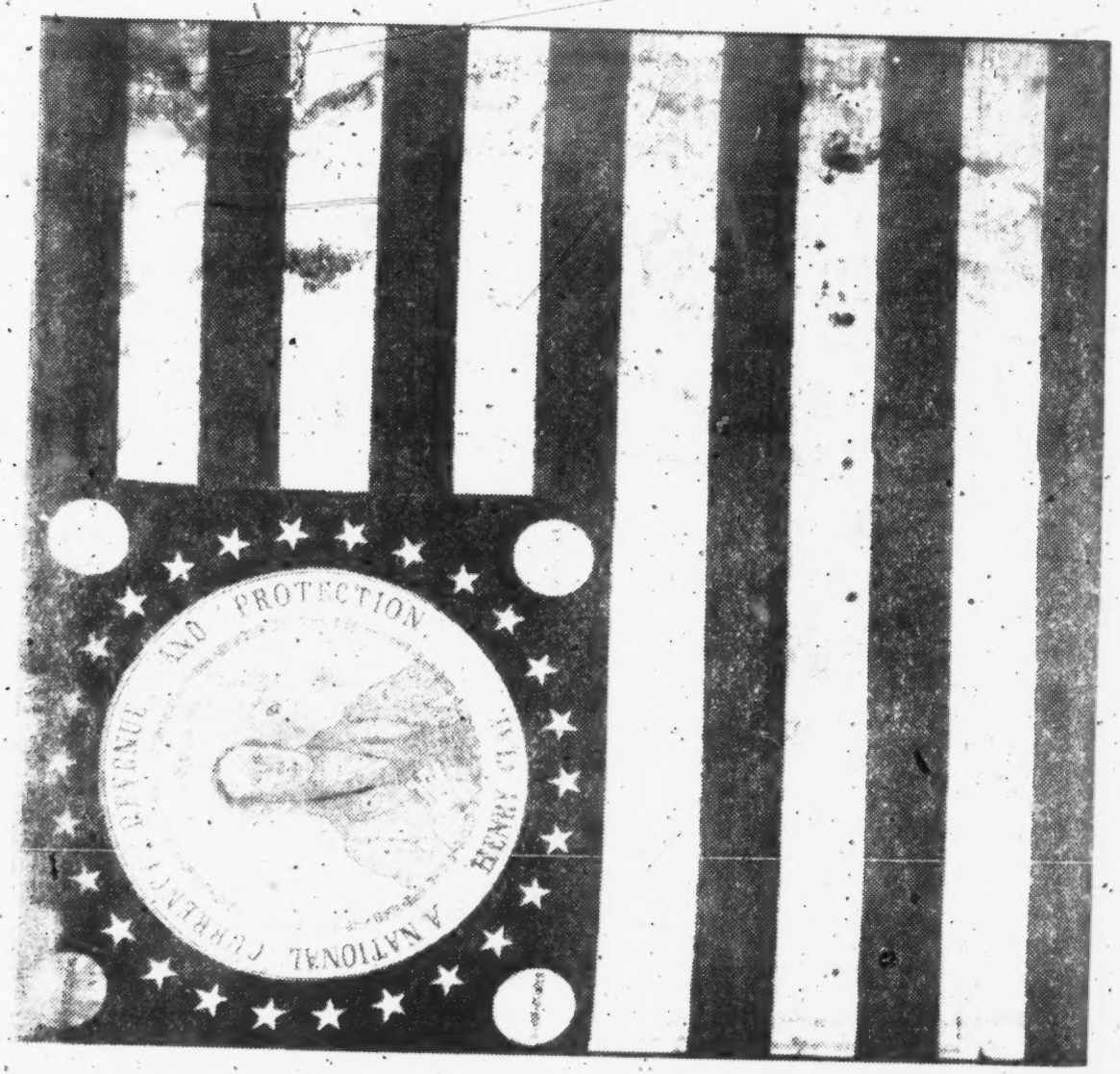

Exhibit G

[CAMPAIGN BANNER OF JOHN BELL—1860]

Exhibit H

[CAMPAIGN BANNER OF ABRAHAM LINCOLN—1860]

Exhibit I

[CAMPAIGN BANNER OF ABRAHAM LINCOLN—1864]

Exhibit J

[Campaign Banner of Ulysses S. Grant—1868]